***THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY**

WRIT PETITION Nos.209 & 283 of 2005

% 18.02.2005

Between:

M/s Dolphin Bar and Restaurant, IL-17 12-5-62,

Kandukur (V) and (M) Prakasam District,
rep. by its Licencee Mr.Chilaka Venkateswarlu (Petitioner in WP.209 of 2005)

M/s Sai Krishna Wines, rep by its Licensee, D.Gopala Krishna S/o.Kondaiah,
R/o.Kandukur.

(Petitioner in WP.283 of 2005)

... PETITIONERS

AND

The Commissioner of Proh. & Excise Govt. of A.P. at Hyderabad & two others
(Respondents in W.P.No.209 of 2005)
The Commissioner of Proh. & Excise Govt. of A.P. at Hyderabad & two others
(Respondents in W.P.No.209 of 2005)

...RESPONDENTS

! COUNSEL FOR THE PETITIOENRS: Mr.T.Amarnath Goud &

P.Balamukunda Rao,

^ COUNSEL FOR THE RESPONDENTS 1 & 2: Mr. M.R.K.Choudary

^ COUNSEL FOR THE RESPONDENTS 3: Mr M.Sudhir Kumar, Adv.

< Gist:

> Head Note:

? CITATIONS:

1. 2004(4) ALD 653
2. 1981(2) APLJ 347
3. 1982(2)ALT (NRC)110
4. AIR 1984 SC 363
5. AIR 1973 SC 303
6. AIR 1977 SC 2411

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE EIGHTEENTH DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE L.NARASIMHA REDDY

WRIT PETITION NOs: 209 & 283 of 2005

W.P.No.209 of 2005

Between:

M/s Dolphin Bar and Restaurant, IL-17 12-5-62,

Kandukur (V) and (M) Prakasam District,
rep. by its Licencee Mr.Chilaka Venkateswarlu

... PETITIONER

AND

1 The Commissioner of Proh. & Excise Govt. of A.P. at Hyderabad.
2 The Proh. and Excise Superintendent Prakasam District at Ongole.
3 M/s Relax Bar and Restaurent, IL-17 D.No.12-5-63, Kandukur (V)

& (M), Prakasam District, rep by its Licencee Mr.Naraiah.

...RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ of Mandamus, or any other appropriate writ, order or direction declaring the Cr.No.22456/2004/CPE/G2, Dt.10.1.2005 of the first respondent and issuing IL-17 licence No.44, Dt.15.1.2005 in favour of the third respondent within 50 meters from the petitioner's licensed premises is contrary to law, illegal and arbitrary and the same is liable to be set aside and further direct the respondents No.1 and 2 not to permit the third respondent to carry on the business at D.No.12-5-63, Kandukur, Prakasam District within 50 meters from the petitioner's licensed premises.

Counsel for the Petitioner: MR.T.AMARNATH GOUD

Counsel for the Respondent Nos.1&2: Mr.M.R.K.Choudary, Advocate GP FOR PROHIBITION & EXCISE

Counsel for the Respondent Nos.3: Mr.M.Sudhir Kumar Advocate

WRIT PETITION NO : 283 of 2005

Between:

M/s Sai Krishna Wines, rep by its Licensee, D.Gopala Krishna S/o.Kondaiah, R/o.Kandukur.

... PETITIONER

AND

1 Commissioner of Prohibition and Excise,

Govt. of AP Nampally, Hyderabad.
2 Prohibition and Excise Superintendent, Ongole, Prakasam District.
3 M/s Sai Lakshmi Wines, Kandukur rep by Prop.G.Venkateswarlu,

S/o.Kondaiah, Kandukur, Prakasam District.

...RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ of Mandamus or any other appropriate writ, order or direction, declaring the permission granted by the Commissioner for shifting the shop of 3rd respondent in his Cr.No.22456/04/CPE/G2 Dt.10.1.2005 as illegal, contrary to law and instructions in force and set aside the same and pass such other orders.

Counsel for the Petitioner: MR.P.BALAMUKUNDA RAO

Counsel for the Respondent Nos.1&2: Mr.M.R.K.Choudary, Advocate GP FOR

PROHIBITION & EXCISE

Counsel for the Respondent Nos.3: Mr.M.Sudhir Kumar Advocate

The Court at the admission stage made the following:

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION Nos.209 & 283 OF 2005

COMMON JUDGMENT:

Certain common questions of fact and law are involved in these two writ petitions. Hence, they are disposed of through a common judgment.

2. Petitioner in W.P.No.209 of 2005 is an IL-17 licensee and established a bar and restaurant in the premises bearing No.12-5-62, Kandukur village and Mandal, Prakasam District. The petitioner in W.P.No.283 of 2005, M/s.Sai Krishna Wines, is an IL-24 licensee, having its shop in the same village. M/s.Sai Laxmi Wines, the third respondent in that W.P., is another licensee in IL-24 and it had its shop in the premises bearing No.12-5-63, in the immediate neighbourhood of the petitioner in W.P.No.209 of 2005.

3. M/S.Sai Laxmi Wines intended to shift its shop from the premises bearing No.12-5-63 and selected the house of one Mr.M.Srinivasa Rao, Kovur Road, Kandukur. In

the premises vacated by M/s.Sai Laxmi Wines, M/s.Relax Bar & Restaurant, third respondent in W.P.No.209 of 2005, intended to establish a bar and restaurant by obtaining an I.L-17 Licence. The Commissioner of Prohibition & Excise (hereinafter referred to as "the Commissioner"), first respondent in both the writ petitions, accorded permission to M/s.Relax Bar & Restaurant, through his proceedings dated 10.01.2005, for grant of IL-17 licence and enable it to establish a Bar in the immediate neighbourhood of the petitioner in W.P.No.209 of 2005. Complaining that the permission was accorded without proper verification and in contravention of the relevant provisions, W.P.No.209 of 2005 is filed.

4. The Commissioner has also accorded permission in favour of M/s. Sai Laxmi Wines, through his proceedings of the same date, i.e. 10.01.2005, for shifting I.L-24 shop. Alleging that the place, to which the shop is permitted to be shifted, is within 26 meters from his shop, and that it is contrary to Rule 35 of the A.P. Indian Liquor and Foreign Liquor Rules, 1970 (for short "the Rules), the petitioner in W.P.No.283 of 2005 assailed the action of the Commissioner.

5. The petitioners urge that shifting of existing I.L-17 or I.L-24 premises is governed by the Rules and that the grant of new licence or permission to shift the existing ones shall conform to such Rules. They plead that for better implementation of the same, the first respondent issued guidelines prescribing various factors, including the distances to be maintained between the shop, and the impugned orders, particularly, the one for shifting, violates the same.

6. The first respondent filed counter affidavits in both the writ petitions. It is stated that though the guidelines have been issued in circulars, from time to time, they do not have the effect of preventing the authorities from according permission wherever it is found feasible. According to them, Rule 35 does not place any restriction in the matter of according permission, and that the instructions do not override the rules. The contesting respondents did not file any counter affidavit, but the counsel representing them put forward their contentions.

7. Sri Balamukunda Rao and Sri T.Amarnath Goud, learned counsel for the petitioners, submit that the shifting of existing licensed shops is squarely covered by Rule 35 of the Rules, as well as the instructions issued by the first respondent. It is their case that on 3.04.2003, the first respondent issued policy guidelines, indicating the distances to be maintained whenever permissions are accorded for shifting existing I.L-17 bars, or I.L-24 shops, and that the same are binding even now. Placing reliance upon several judgments of Supreme Court and this Court, they contend that it is not open to the first respondent to ignore the said guidelines and to grant permissions indiscriminately. They also invoke the principle of estoppel. In relation to grant of IL-17 licence to M/s.Relax Wines, it is contended that it was granted on the same day on which the application was made.

8. Sri M.R.K.Chowdary, learned Senior Counsel appearing for the contesting respondents in both the writ petitions, submits that the only rule, which stipulates distances between various shops or establishments, is Rule 29, and there do not exist any restrictions as to distances in Rule 35. He contends that when an attempt was made to introduce restrictions, as to distances through administrative instructions, this Court interfered and held that it is impermissible. The learned Counsel states that even assuming that there exists any administrative instructions governing the matter they cannot override the statutory rules, nor can restrict the discretion of the concerned authority. To the same effect are the arguments of the learned Government Pleader for Prohibition & Excise.

9. The petitioners are the existing licensees of IL-17 and IL-24, respectively, and they are continuing their business in their licensed premises. M/s.Sai Laxmi Wines, which was functioning in the immediate neighbourhood of the petitioner in W.P.No.209 of 2005, an I.L-17 licensee, intended to shift to a place nearer to the shop of the petitioner in W.P.No.283 of 2005. In the premises so vacated, a bar and restaurant is sought to be established by M/s.Relax Bar & Restaurant. Through his separate proceedings, dated 10-1-2005, the first respondent accorded permission for shifting in favour of M/s.Sai Laxmi Wines, and granted licence in I.L-17 in favour of M/s. Relax Bar & Restaurant. These two steps are interrelated. Therefore, it needs to be seen as to whether the action of the first respondent conforms to the relevant provisions of law.

10. It needs to be kept in mind that the provisions of law are different in the matter of according permission to shift existing premises on the one hand and grant of licence for the first time on the other hand, are different. Rule 29 contains the restrictions on grant of licences. Rule 35 regulates the procedure for according permission for an existing licensee, to shift from one premises to another. Rule 35 by itself does not indicate any restrictions as to distances to be maintained between shops of different categories in the event of approval being accorded by the Commissioner. The rule reads as under:

> "**Sale permitted at the licence premises only:-** (1) The licensee shall sell the liquor only at the premises specified in the licence.
>
> (2) No change or alteration of the licensed premises shall be made nor the licensed premises shifted elsewhere without the prior approval of the Commissioner of Prohibition and Excise.
>
> Provided that in the case of a licensed premises in respect of any IL-24 licence shifting from one location to another can be permitted only within the same revenue village or town or Excise Station limits only in the case of Municipal Corporation, by levying a fee of Rs.10,000/-."

11. The proviso has been subjected to frequent amendments. From a reading of the rule, it is evident that shifting is possible only with the prior approval of the Commissioner, and such approval can be granted on compliance with the conditions stipulated under the proviso.

12. To ensure uniformity and consistency in the matter of according such permissions, the first respondent framed guidelines in Circular dated 3.04.2003. It is issued exclusively, in the context of shifting of shops, as distinguished from granting licences. After referring to the representation of the A.P. Wine Dealers Association, the relevant portion of the circular reads as under:

> "In view of the above, the matter has been examined keeping in view the above instructions and representation of the Association and it is decided tokeep the distance restriction of 50 metres from IL-17(Bar) to IL-17 Bar, IL-17 (Bar) to IL-24 (Retail) shop and IL-24 (Retail) to IL-24 (Retail) shops to maintain uniformity through out the State. However, this distance restriction will not be applicable to the following.
>
> i. existing IL-17 Bars and the IL-24 shops irrespective of any distance.

ii. IL-24 shops and IL-17 bars in the Municipal Corporation and their belt areas.

iii. IL-24 shops going to be established after the notification.

These instructions are issued in supercession of the instructions issued vide reference 1 to 3 cited and these instructions will not apply for the cases of shifting/establishment of IL-24 shops/IL-17 bars already issued from the office of the Commissioner of Proh. & Excise, A.P., Hyderabad, so far. Therefore, all the Proh.& Excise Superintendents in the State are directed to take necessary action in the matter for all the cases to be processed in future."

13. The distance between IL-24 shop of the petitioner in W.P.No.283 of 2005 and the proposed location where M/s. Sai Laxmi Wines proposed to establish its shop is less than 50 meters. The respondents 1 and 2 did not dispute that the distance is only 26 meters. Therefore, the grant of permission by the first respondent in favour of M/s.Sai Laxmi Wines to shift its shop to a place less than 50 meters from that of the petitioner is clearly violative of the circular dated 3.04.2003.

14. Learned Senior Counsel points out that the circular runs contrary to the statutory rules, and in that view of the matter, it is inoperative in law. He places reliance upon the judgment of this Court in ***Kanakadurga Wines, IL-24, Vemulavada Village, Karimnagar District V. Government of Andhra Pradesh***. According to him, the Commissioner, through his administrative instructions cannot provide for an aspect, which had eschewed expressly or by necessary implication, under the Rules.

15. The subject matter in that case was the one under the Rule 29 of the Rules. The fact that Rule 29 contained a provision imposing restrictions as to distances and was deleted thereafter was taken into account. Placing reliance upon the judgment of this Court in ***Superintendent of Excise V. Beesanna Goud*** and a judgment referred by a Division Bench in ***Toddy Tappers Co-operative Society, Kored V. Superintendent of Excise and others,*** the learned Single Judge held that when the legislature, in its wisdom omitted the restriction as to distance contained in sub-rule (5) of Rule 29, it was not competent for the Commissioner, to indirectly insert such a restriction. The ratio laid down in the said judgment does not apply to the facts of this case. The reason is that the present case is governed by Rule 35, and this Rule never contained any provision as to distance, to be maintained between different categories of shops. In exercise of his power under Section 4 of A.P. Excise Act, 1968 (for short "the Act"), as a chief controlling authority, the first respondent

issued the administrative instructions, to guide the discretion. The instructions are neither *ultra vires* the Rules nor supplant the Rule as such. At the most, it provided for guidance for implementation of the rules in an objective and transparent manner. The circular does nothing more than filling in the "yawning gaps" in the rules, which was held to be permissible by a Division Bench in ***Toddy Tappers Co-operative Society, Kored V. Superintendent of Excise and others*** (3rd supra).

16. The contention that the circular is only in the nature of instructions and it cannot override the rules, or that it is not so mandatory as to nullify any order passed in contravention of the same; cannot be accepted. In this regard, it needs to be observed that whenever the administrative head of a department of a Government frames regulations or guidelines for implementation of the statutory provisions or policy of the Government, they are meant to be followed scrupulously. Time and again Supreme Court held that even administrative instructions are required to be followed meticulously. Reference in this regard can be made to the judgment of the Supreme Court in ***B.S.Minhas V. Indian Statistical Institute, Union of India V. K.P.Joseph,*** and ***State of U.P. V. Chandra Mohan Nigam***. Elaboration of the principle or addition of some more case law would only add to the length of the judgment. Therefore, the order dated 10.01.2005 passed by the first respondent, according permission to M/s.Sai Laxmi Wines, is contrary to the Memo dated 3.04.2003, and thereby is liable to be set aside.

17. Now it remains to be seen as to whether the permission accorded by the first respondent to M/s.Relax Bar & Restaurant, respondent No.3 in W.P.No.209 of 2005, is in accordance with law. In fact, this permission becomes infructuous, once the permission accorded to M/s Sai Laxmi Wines, to shift its shop is set aside.

18. On 10.01.2005, the first respondent passed three orders in relation to shifting of IL-24 shop by M/s.Sai Laxmi Wines, as well as granting of permission to issue licence in IL-17, in favour of M/s.Relax Bar & Restaurant. In one letter, he called for a report from the Excise Superintendent, on a combined representation made by the proprietors/owners of the IL-24 licensee and IL-17 applicant. Even before any report is received, permission was accorded for shifting of IL-24 licence from Door No.12-5-63, O.V. Road, Kandukur, to the premises owned by M.Srinivasa Rao at Kovur road of the same village. Much before the shop was shifted from Door No.12-5-63, the Commissioner accorded permission for grant of licence in favour of M/s.Relax Bar &

Restaurant, for establishing a bar and restaurant, in the same premises, namely 12-5-63, Kandukur. There was, virtually, no occasion for the authorities to verify the suitability or otherwise of the said premises. Mere according permission to the existing IL-24 licensee to shift does not result in the premises becoming vacant. In the context of granting of licence in IL-17, the licensing authorities are under obligation to verify the nature of premises, with reference to the specifications under the rule, parking area, etc. When an IL-24 licence was very much functioning as on 10.01.2004, grant of permission to establish a bar and restaurant, in the same premises, cannot be said to be the result of a proper exercise of power. Hence, the permission accorded in favour of M/s.Relax Bar & Restaurant is also liable to be set aside.

19. For the foregoing reasons, both the writ petitions are allowed, and the permissions accorded in favour of the respondent No.3, in each of the writ petitions, are set aside. This, however, does not preclude the respondents 1 and 2, in both the writ petitions, to consider the applications and pass orders afresh, in accordance with law. There shall be no order as to costs.

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L. NARASIMHA REDDY, J.

Dt.18-02-2005.

Note:

L.R. copy to be marked.

C.C.by 21.02.2005.

(B/O)

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(One fair copy to the Hon'ble Sri Justice L.Narasimha Reddy

for his Lordship's kind perusal)

To

1 The Commissioner of Proh. & Excise Govt. of A.P. at Hyderabad.
2 The Prohibition & Excise Superintendent, Prakasam District,

at Ongole.
3 Two C.Cs to the Govt.Pleader for Proh. & Excise,

High Court buildings, Hyderabad (OUT)

4 The Under Secretary, Ministry of Home and Company Affairs,

Union of India, New Delhi.

5 The Secretary, A.P.Advocates' Association, Library,

High Court buildings, Hyderabad.

6 8 lr copies

7 Two C.D. copies.